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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.,

Petitioner,

—v.—

CITY OF ST. PAUL, MINNESOTA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE MINNESOTA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, MINNESOTA CIVIL LIBERTIES UNION, AND AMERICAN JEWISH CONGRESS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Minnesota Civil Liberties Union (MCLU) is a statewide affiliate of the ACLU.[2]

This case raises issues of significant and longstanding concern to the ACLU and its affiliates. On the one hand, the ACLU has vigorously defended the right of all Americans to live wherever they choose without regard to race, and has repeatedly called on the government to intercede when that right is threatened. On the other hand, the ACLU has vigorously resisted efforts to curtail freedom of expression because the message conveyed may be unpopular or offensive.

The American Jewish Congress (AJC) is an organization of American Jews founded in 1918 to protect the political, civil, religious and economic rights of American Jews. Most of these rights can be effectively exercised only where Jews are free from physical intimidation or threats of violence motivated by anti-semitism or other forms of racism. The AJC applauds, therefore, governmental efforts to prosecute such crimes. The AJC also believes, however, that the laws employed in that effort are not exempt from the requirements of the Free Speech Clause of the First Amendment.

Striking the correct balance between these competing interests is a difficult and sensitive task. *Amici*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] On June 10, 1991, this Court granted the MCLU's motion for leave to file an *amicus curiae* brief in support of the petition for *certiorari*.

respectfully submit this brief in the hope of assisting the Court as it considers where the appropriate constitutional lines can and should be drawn.

STATEMENT OF THE CASE

Petitioner is a juvenile. On the night of June 21, 1990, he was staying with a friend at 291 Earl Street in St. Paul, Minnesota. The government alleges that sometime between the hours of 1:00 a.m. and 3:00 a.m., petitioner and five others burned a cross on the front lawn of a black family that lived at 290 Earl Street.[3] The victimized family was the only black family living on the block. It included five children ranging in age from six months to nine years. Their father informed police that he was aroused by the sound of at least two voices in his front yard and saw the burning cross when he went to the window to investigate the noise.[4]

The cross he observed burning in his front yard was approximately two feet long in each direction. It was constructed from the legs of a broken chair, which were wrapped in terrycloth and doused with paint thinner. The government describes petitioner as a "central instigator" and "enthusiastic supporter" of the cross burning. Although it does not attribute any specific statement to petitioner himself, the government contends that petitioner and his cohorts had a general discussion prior to the cross burning about causing some "skinhead trouble" and "burning some niggers." The government also alleges that petitioner participated in two other cross burnings later that same evening, one across the street from 290 Earl Street, and one in an apartment complex a few blocks away where several other black families lived.

On June 25, 1990 -- four days after the incidents described above -- a delinquency petition was filed against petitioner in the Ramsey County Juvenile Court. The first count charged petitioner with fourth degree assault in violation of state law.[5] The second count charged petitioner with bias-motivated assault in violation of a local ordinance.[6] This second count was reduced to bias-motivated disorderly conduct in an amended petition filed on July 5, 1990. Specifically, petitioner was charged in the amended petition with violating St. Paul City Ordinance §292.02, which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed,

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[3] This case arises on a motion to dismiss. *Amici* have, therefore, relied on the statement of facts set forth by respondent. *See* Brief in Opposition to the Petition for *Certiorari* ("Op.Cert.") at 2-6. At the same time, it is important to note that petitioner has denied the allegations against him. *See* Petition for *Certiorari* ("Cert.Pet.") at 3.

[4] There is some evidence in the record that the same family had suffered other acts of vandalism during the preceding months but no evidence linking petitioner or his associates to those acts.

[5] *See* Minn. Stat. §609.2231, Subd. 4.

[6] The bias-motivated assault charge rested on St. Paul City Ordinance §292.01. It states:

> Whoever, intentionally or with reckless disregard of so doing, puts another in fear of immediate bodily harm or death by placing on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which is reasonably understood as communicating threats of harm, violence, contempt, or hatred on the basis of race, color, creed, or religion or gender, commits an assault and shall be guilty of a misdemeanor.

religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Prior to trial, petitioner moved to dismiss the charge of bias-motivated disorderly conduct, arguing that the broad and sweeping language of §292.02 could not be sustained under the First Amendment. The trial court granted petitioner's motion in an order dated July 16, 1990. The Minnesota Supreme Court then accepted the state's accelerated appeal and, on January 18, 1991, reversed the decision of the trial court.

In remanding the case for trial, the Minnesota Supreme Court did not uphold the statute as written. To the contrary, it acknowledged that the "ordinance should have been more carefully drafted." 464 N.W.2d 507, 511 (1991). Nevertheless, it rejected petitioner's overbreadth argument by interpreting the ordinance to reach only expression that is unprotected by the First Amendment because it represents "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), or because it is intended and likely to produce "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The court's description of the "fighting words" doctrine begins by distinguishing the ordinance at issue here from the flag desecration statute struck down in *Texas v. Johnson*, 491 U.S. 397 (1989). Thus, the decision below emphasizes that the St. Paul ordinance only applies to "those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias." 464 N.W.2d at 510. What the decision below does not explain is whether all such "displays" qualify as "fighting words," in which event the court's purported limiting construction is in fact no narrower than the statute itself.

The court's discussion of the *Brandenburg* doctrine is equally brief, and consists of little more than a restatement of the *Brandenburg* holding. There is no explanation of how the facts of *Brandenburg* (which involved another cross burning) compare to the allegations in this case, or how the *Brandenburg* standard relates to the court's stated view that "[t]he burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." 464 N.W.2d at 508 (footnote omitted). Finally, the decision below does not address when, if ever, the anticipated violence of a hostile audience can satisfy the *Brandenburg* standard and its intent requirement.

SUMMARY OF ARGUMENT

This case began with an act of racism and hatred that deserves condemnation by government at every level. But, in combatting such racism, government may not ignore the First Amendment principles that distinguish our constitutional system, and that have played such a large role in the still ongoing struggle for equal rights. *See, e.g., Cox v. Louisiana*, 379 U.S. 536 (1965).

The St. Paul ordinance violates those principles because its broad prohibitory language embraces whole categories of protected speech. As acknowledged by the court below, a ban on expressive activities that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" cannot be reconciled with our society's commitment that "debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). At this stage of the proceedings, therefore, no one is claiming that the ordinance, as written, can be sustained.

Even as narrowed by the Minnesota Supreme Court, however, the ordinance remains constitutionally defective. First, the narrowing construction has rendered the ordinance unconstitutionally vague. In effect, the residents of St. Paul have been told that they have a right to engage in any speech that the Constitution protects but

have no right to engage in speech that is outside the First Amendment. As a matter of abstract principle, that statement is undoubtedly correct. As the basis for a criminal ordinance, it inevitably forces persons of common intelligence to guess at its meaning and act at their peril. This Court has correctly and consistently demanded greater specificity when First Amendment rights are at stake. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Furthermore, to the extent that the Minnesota Supreme Court's doctrinal references are given meaning by reading its opinion as a whole, substantial overbreadth problems emerge. *See Lewis v. New Orleans*, 415 U.S. 130 (1974). Those problems reflect the difficulties inherent in attempting to "save" through judicial interpretation an ordinance that is so fundamentally flawed. *Amici* respectfully submit that this is an ordinance that simply cannot be "saved." It should, therefore, be declared facially invalid, as this Court has done on similar occasions in the past. *E.g., Houston v. Hill*, 482 U.S. 451 (1985).

At the same time, the flaws in this particular ordinance do not mean that St. Paul and other communities throughout the country can never penalize what this Court has described as a "true" threat. *Watts v. United States*, 394 U.S. 705, 708 (1969)(*per curiam*). However, any attempt to define a "true" threat must be sensitive to First Amendment values. Thus, the advocacy of ideas is protected by the First Amendment, no matter how offensive or unpopular those ideas may be. On the other hand, the First Amendment does not protect the right to threaten specific victims when the threat is intended by the speaker to instill an imminent fear of violence and would be understood by a reasonable listener in those terms. For example, a threat to physically assault someone who exercises the right to vote is surely outside the scope of First Amendment protection. *See, e.g.*, 18 U.S.C. §241.

Amici do not contend these distinctions are easy to draw. They are the distinctions that the Constitution demands.

ARGUMENT

I. THE CHALLENGED ORDINANCE IS UNCONSTITUTIONAL AS WRITTEN AND AS CONSTRUED

Amici recognize that the challenged ordinance has been substantially narrowed by the Minnesota Supreme Court and that its construction of state law is authoritative. Nevertheless, the validity of the narrowing construction cannot be assessed without first considering the breadth of the original enactment. The process of judicial construction works best when the distance to be travelled from an unconstitutional ordinance to a constitutional one is relatively small. When the distance is enormous, as it was in this case, the effort to save the ordinance from invalidation inevitably substitutes one set of constitutional problems for another.

That is precisely the dilemma created by the decision below. The problems of vagueness and overbreadth have not gone away; they have merely been reformulated. *Amici* respectfully submit that the correct response to this dilemma -- from the perspective of constitutional theory and democratic governance -- is to return the matter to the St. Paul City Council for its reconsideration under appropriate guidelines set forth by this Court.

A. The Ordinance, As Written, Sweeps Within Its Ambit Whole Categories Of Protected Speech

Petitioner was charged with violating a St. Paul ordinance that prohibits the display, on *any* public or private property, of *any* "symbol, object, appellation, charac-

terization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender . . . ." This sweeping language has been condemned as unconstitutional by every judge to review this case. Even respondent no longer defends it. In this Court, therefore, it is undisputed that the challenged ordinance cannot be sustained in any form that remotely resembles what the city council actually adopted.

It is an axiom of First Amendment jurisprudence that laws regulating expression must be narrowly drawn so that they do not stray beyond the particular evil to be controlled. A statute restricting expression is overbroad if it fails to respect this rule; if, in other words, it sweeps within its reach a significant amount of protected speech along with expression that may legitimately be regulated. *See, e.g., Houston v. Hill*, 482 U.S. at 458-60; *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

As written, the challenged ordinance falls far short of the specificity required by the First Amendment. By its very terms, the ordinance targets only communicative activity. Moreover, the communicative activity is prohibited only because of the message it conveys. The prohibited message, in turn, is defined in the broadest possible terms. The only limiting condition is that the speaker must know or have "reasonable grounds to know" that the expression is of the sort that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."

The reach of this prohibition is extraordinary. It potentially applies to virtually all symbolic speech addressing issues of race, color, creed, religion, or gender. It also reaches beyond the symbolic to embrace pure speech as well. For example, a resident of St. Paul who

erected a billboard on his own property expressing his own view that women belonged at home rather than at work could easily be subject to prosecution under the literal terms of this ordinance. Even more extraordinarily, the victims in this case would be facing prosecution if they responded to the cross burning by placing a sign on his front lawn condemning white racism.

There is no doubt that these political views, however popular or unpopular they may be, are fully protected by the First Amendment. In the frequently quoted words of Justice Jackson:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Few would dispute that the protection of minorities that have been victimized by discrimination for much of our history warrants the most forceful response from every level of government. But even such fundamental obligations of government cannot be accomplished by the wholesale exclusion of certain topics from the rough and tumble of public debate. "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be." *Id.* at 641. For that reason, our constitutional system prohibits the suppression of speech if it is only "the speaker's opinion that gives offense," *FCC v. Pacifica*, 438 U.S. 726, 745 (1978).

Here, the plain language of the St. Paul ordinance unambiguously demonstrates that its drafters were motivated by their desire to suppress "offensive" opinions. Thus, this is not a case where "the governmental interest is unrelated to the suppression of free expression,"

United States v. O'Brien, 391 U.S. 367, 376 (1968). To the contrary, the impact of the ordinance on protected speech is both direct and intentional. To be sure, the ordinance was prompted by laudable aims. However, even legitimate goals cannot be achieved through overbroad limits on protected speech. *See Houston v. Hill*, 482 U.S. 451. The explanation goes to the heart of our notions of political legitimacy. "Authority [in this country] is to be controlled by public opinion, not public opinion by authority." *Barnette*, 319 U.S. at 641.[7]

Nor is this a case where the overbreadth of the ordinance can be dismissed as marginal or theoretical. *Compare New York v. Ferber*, 458 U.S. 747 (1982). By any objective measure, its unconstitutional reach dwarfs its constitutional applications. In its effort to preserve as much of the statute as it possibly could, the Minnesota Supreme Court identified only two applications that even conceivably satisfied constitutional standards: fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568; and speech that is both intended and likely to produce imminent lawless action, *see Brandenburg v. Ohio*, 395 U.S. 444.

As described more fully below, *amici* do not believe that this limiting construction is sufficient to rescue the ordinance from invalidity. *See* Point IB, *infra*. It does, however, convincingly demonstrate the failure of the legislature to enact an ordinance that even remotely approaches the close fit between means and ends that the Constitution demands when regulating speech. Whatever else one might say about the *Chaplinsky* and *Brandenburg* standards, they have rarely been met in the reported cases. By contrast, one need only open the daily paper to see how much protected speech has the potential to arouse "anger, alarm or resentment" on the basis of race, color, creed, religion, or gender.

[7] Because most expression covered by the ordinance is constitutionally protected, and because the ordinance has a significant potential to restrict such expression directly rather than as an incidental consequence of the legitimate regulation of other conduct, the ordinance as written cannot be upheld unless it survives "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). It plainly cannot, as even the court below acknowledged.

The danger to First Amendment values presented by any ordinance that sweeps this broadly was cogently set forth in *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1985). Rejecting a First Amendment standard that hinged on the "outrageousness" of the disputed comment, Chief Justice Rehnquist wrote for a unanimous Court:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Precisely the same reasoning applies in this case and explains why the challenged ordinance is substantially overbroad in its originally enacted form. At this stage of the proceedings, no one seriously claims otherwise.

B. The Ordinance, As Construed, Remains Constitutionally Invalid

Faced with an ordinance that was facially unconstitutional in its overbroad attempt to regulate speech, the Minnesota Supreme Court chose to adopt a narrowing construction purportedly based on this Court's decisions in *Chaplinsky* and *Brandenburg*. That interpretation of state law is authoritative and must be accepted by this Court. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972);

Cramp v. Board of Public Instruction, 368 U.S. 278, 285 (1961). This Court need not accept, however, the Minnesota Supreme Court's determination that the ordinance, as narrowed, is constitutionally valid. In fact, serious problems of overbreadth and vagueness remain.

In urging this Court to reverse the decision below, *amici* are mindful of this Court's admonition that a judicial order declaring a statute unconstitutional on its face is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. at 613. Yet, the Court has never confused this admonition with an injunction. Thus, this Court has continued to recognize that some enactments are so extreme in their disregard of constitutional boundaries, provide so little foundation for a saving construction, and inhibit such substantial areas of constitutionally protected expression, that they simply cannot be redeemed through judicial interpretation. *See, e.g., Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987); *Houston v. Hill*, 482 U.S. 451; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

In these cases and others like them, the Court could have adopted a limiting construction similar to the one embraced by the Minnesota Supreme Court.[8] However, as this Court implicitly recognized, such an approach would fatally undermine the overbreadth doctrine. It would also erode the system of political accountability by

[8] The Minnesota Supreme Court acknowledged these cases but distinguished them on the ground that the statutes under review were not susceptible to a limiting construction. 464 N.W.2d at 510 n.3. This purported distinction is without merit because it misunderstands the nature of this Court's concern. Had it chosen to do so, the Court could have ruled in *Jews for Jesus* that the airport regulation prohibiting "all First Amendment activity" only applied if the *Chaplinsky* or *Brandenburg* standards were met. In declining to do so, the Court was not limited by the language of the regulation but, rather, by its own sense of the appropriate judicial response to a rule that, on its face, so clearly exceeds permissible First Amendment limits.

encouraging legislators to avoid hard value judgments by relying on the judiciary to provide substantive content to obviously vague and overbroad statutes.

The difficulties inherent in asking the judiciary to perform this essentially legislative task are exemplified by the present case. In effect, the Minnesota Supreme Court has created an ordinance that says, "fighting words are illegal." Yet, neither the ordinance that remains on the books nor the Minnesota Supreme Court decision provide any meaningful guidance on what that standard means or how it relates to the law's original ban on speech that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."

Certainly, one possible interpretation of the decision below is that any speech that violates the statutory language also represents the sort of "fighting words" that the Minnesota Supreme Court intends to condemn. However, if that is so, then the limiting construction adopted by the Minnesota Supreme Court is in fact no more limited than the statutory language it purports to construe. Conversely, if the judicial standard developed by the Minnesota Supreme Court is meant to be different than the legislative standard enacted by the St. Paul City Council, it is fair to ask where the differentiations lie. That question was neither asked nor answered by the Minnesota Supreme Court's opinion.

As this Court has often noted, a statute is unconstitutionally vague when persons of common intelligence are left to guess at its meaning. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Accordingly, the Court has repeatedly held that a criminal statute must give adequate warning of the conduct it prohibits, and must set out explicit standards to guide those who enforce it. *Id.* The Court has also stressed that the need for specificity is especially great when First Amendment rights are at stake. *See Smith v. Goguen*, 415 U.S.

at 573. The decision below largely disregards these critical lessons.

Perhaps the Minnesota Supreme Court believed that the vagueness problems inherent in the ordinance were resolved because it couched its opinion in terms of familiar constitutional doctrines. If so, it was mistaken. It is not enough, for example, to say that obscenity is prohibited. The prohibited conduct "must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller v. California*, 413 U.S. 15, 24 (1973)(footnote omitted). Likewise, it is not enough to say that "fighting words" are prohibited when the rest of the statute that might give context to that phrase has been declared unconstitutional.[9]

In addition to the trap it presents to the unwary, the unelaborated reference to "fighting words" and the Brandenburg standard also invites abuse by law enforcement officials. "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague . . . statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. at 435. In this case, it does not take much foresight to predict that the charge of "fighting words" is more likely to be made when those doing the speaking are outside the political mainstream. The inevitable, and constitutionally unacceptable, result is self-censorship.

Finally, the limiting construction adopted by the Minnesota Supreme Court continues to be plagued by problems of overbreadth. The nature of those problems is best illustrated by the decision in *Lewis v. New Orleans*, 415 U.S. 130. The defendant in *Lewis* was charged with violating a local ordinance that made it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to" any police officer. Following a remand for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518, the Louisiana Supreme Court ruled that the statutory language only applied to "fighting words uttered to specific persons at a specific time . . . ." *Lewis*, 415 U.S. at 131.

Given that interpretation, the statute this Court ultimately considered in *Lewis* was virtually identical in scope to the St. Paul ordinance, as it has now been construed. Contrary to the approach advocated by respondent in this case, however, the *Lewis* Court did not regard the overbreadth issue as settled by a barebones reference to the fighting words doctrine. Instead, it read the opinion of the Louisiana Supreme Court as a whole and concluded:

> That the Louisiana Supreme Court contemplated a broader reach of the ordinance is evident from its emphasis upon the city's justification for [its] regulation . . . [According to the Louisiana Supreme Court], "permitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer's activities and the place where such activities are performed."

415 U.S. at 132 (citation omitted). Based on that explanation, this Court held that the challenged ordinance "is overbroad in violation of the First and Fourteenth Amendments and is therefore facially invalid." *Id.* at 131-32.

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[9] This Court has frequently invalidated statutes on vagueness grounds despite a purported limiting construction by the state's highest court. *See, e.g., Cox v. Louisiana*, 379 U.S. at 551; *Cramp v. Board of Public Instruction*, 368 U.S. at 287; *Winters v. New York*, 333 U.S. 507, 518-19 (1948).

The opinion of the Minnesota Supreme Court suffers from a similar defect. As in *Lewis*, the reference to fighting words and *Brandenburg* in the decision below can only be understood in context. Specifically, the purported limiting construction adopted by the Minnesota Supreme Court is necessarily colored by its view that "[t]he burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." 464 N.W.2d at 508 (footnote omitted). To the extent that the reference to the burning cross as "an unmistakable symbol of violence and hatred" is meant to suggest that every burning cross can be proscribed under either the fighting words doctrine or the *Brandenburg* standard, even the reconstructed ordinance is dramatically overbroad. *See* Point I, *supra*. To the extent that this implication was not intended by the Minnesota Supreme Court, the meaning of its decision is necessarily in doubt, and those seeking guidance from the decision are left to act at their own peril.

The inability of the Minnesota Supreme Court to craft a narrowing construction of the St. Paul ordinance that meets constitutional standards does not mean that the goal of curtailing unprotected threats cannot be achieved. It does suggest that the problems in this ordinance are too fundamental to be resolved on a piecemeal basis. Notwithstanding this Court's preference for case-by-case adjudication, *see Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985), *amici* respectfully suggest that the St. Paul ordinance is so fatally flawed, even as construed, that it can and should be declared facially invalid. The decision to reexamine the issues addressed by this ordinance will then return where it belongs -- to the political branches. *Amici* believe that any subsequent debates must be guided by the principles set forth below.

II. THE FIRST AMENDMENT PROTECTS THE ADVOCACY OF IDEAS, EVEN WHEN THAT ADVOCACY CARRIES A MESSAGE OF RACIAL SUPREMACY, BUT THE FIRST AMENDMENT DOES NOT PREVENT THE STATE FROM PROSECUTING AN ACT OF CROSS BURNING DESIGNED TO THREATEN OR INTIMIDATE SPECIFIC AND IDENTIFIABLE VICTIMS

This society has rested its faith on the proposition that "the remedy [for speech] is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J. concurring). Accordingly, our constitutional tradition demands that even a message of racial supremacy is entitled to be heard so long as it remains in the realm of advocacy. Those who articulated this faith in public debate were not naive about the power of words or symbols. To the contrary, they believed that pernicious ideas were more dangerous when suppressed than when exposed. As students of history, they also doubted the wisdom of vesting government officials with the power to declare certain ideas illegal.[10]

This Court has shared that belief. Thus, in *Brandenburg v. Ohio*, 395 U.S. 444, the Court rejected the notion that the Klan's hateful views on racial supremacy can be subject to criminal prosecution if expressed through the burning of a cross at a political rally. Two years ago, this Court similarly held that the First Amendment protects the act of burning the flag as a sign of political protest no matter how offensive it might be to some who

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[10] *See Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting)("when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . .").

observed it and, indeed, even if the purpose of the protest was to stir resentment. *Texas v. Johnson*, 491 U.S. 397.[11]

Conversely, what this Court described as a "true" threat in *Watts v. United States*, 394 U.S. at 708 has never been entitled to constitutional protection. In deciding what constitutes a "true" threat, moreover, there is no reason in law or logic that a message that would be subject to criminal sanction if delivered in words is somehow immunized from punishment by the state if communicated symbolically. The use of symbols rather than words may complicate prosecution for the simple reason that symbols are inherently more ambiguous than words. Properly understood, however, that complication reflects a problem of proof and not principle. To choose one example, extortion is unlawful whether the threat of violence is communicated in words or by delivering a dead fish to the victim's door.

The petitioner in this case is accused of burning a cross in the middle of the night on the front lawn of the only black family living on a residential block in St. Paul, Minnesota, after petitioner allegedly participated in discussions that included references to causing some "skinhead trouble" and "burning some niggers." It is undisputed that if these allegations are proven at trial petitioner's conviction for such content-neutral crimes as trespass or vandalism would raise no constitutional issue.

Amici believe it is equally clear that the state's legitimate concerns go beyond the interest in preventing trespass and vandalism. Specifically, *amici* believe that the state may punish threats and intimidation but, in doing so, the state must act according to the sort of carefully

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[11] *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)(free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

crafted rules suggested below, which are designed to preserve the "breathing space" that First Amendment freedoms need "to survive." *NAACP v. Button*, 371 U.S. at 433. Indeed, *amici* believe that the state has an affirmative obligation to protect its citizens against genuine threats or intimidation that are designed to interfere with the exercise of the victim's own civil or constitutional rights.

Faced with the difficult but constitutionally compelled task of distinguishing between racially charged rhetoric and actionable threats, certain limiting principles must be kept in mind. Most fundamentally, any attempt to prosecute speech (or expressive activity) because of its allegedly threatening character must depend on a showing that the alleged threat was directed at a specific victim or victims.[12] It is undoubtedly true that generalized comments disparaging particular groups can often be perceived as threatening or intimidating, especially if those belonging to the disparaged group see themselves as vulnerable members of society. But it is equally true that generalized comments can often be answered through debate in a way that targeted threats against specific individuals simply cannot.[13]

The distinction between threats that are focused on specific individuals and unfocused threats that, in the heat of the moment, can often be part of the advocacy of ideas, is essential to understanding this Court's decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). Although *Claiborne Hardware* was a civil action rather than a criminal prosecution, it raised many of the

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[12] As explained below, this is a necessary but not sufficient condition.

[13] This distinction is not a novel one. Our First Amendment jurisprudence permits individual libel actions with appropriate safeguards. Group libel actions have been generally discredited notwithstanding the decision in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *See, e.g.*, L. Tribe, *American Constitutional Law* 926 n.42 (2d ed. 1988).

same line-drawing problems presented by this case. In particular, the plaintiffs in *Claiborne Hardware* based their claim for damages, in part, on the assertion that Charles Evers, who was then a representative of the NAACP, had told a rally of supporters that anyone who "broke the boycott" organized by the NAACP against white merchants would "have their necks broken." 458 U.S. at 900 n.28. Plaintiffs contended that this "threat" was unprotected by the First Amendment and had directly led to the economic injury they allegedly suffered.

This Court disagreed. While not explicitly referring to the generalized nature of Evers' remarks, a unanimous Court wrote: "Strong and effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Id.* at 928. Applying the *Brandenburg* test, the Court then held: "When such appeals do not invite lawless action, they must be regarded as protected speech." *Id.*

Amici believe that *Claiborne Hardware* was correctly decided. But *amici* also believe that different values are at stake when the threat is directed toward a specific victim. Under those circumstances, the state has an additional interest in protecting its citizens against the reasonable fear that they may be subject to violence unless they submit to the demands of whoever is threatening them.[14] Moreover, in contrast to the *Brandenburg* test, which was developed to deal with group exhortations, *amici* do not believe that proof of a "true" threat should depend on a showing that violence (as opposed to the fear of violence) is "imminent." For example, *amici*

[14] *See, e.g., Pipefitter Local Union No. 562 v. United States*, 407 U.S. 385, 422 (1972)(interpreting the term "threat" in §205 of the Federal Election Campaign Act as "includ[ing] the creation of an appearance of an intent to inflict injury").

believe that the statement, "we will break your legs if you dare to vote next week," could be prosecuted by the government upon a showing that it represents a deliberated and believable threat against a specific victim.[15]

Amici do not suggest that the reasonable apprehension of fear alone is a sufficient predicate for criminal prosecution. Because we are dealing with speech, *amici* believe that the state must carry the additional burden of proving that "the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Rogers v. United States*, 422 U.S. 35, 48 (1975)(Marshall, J., concurring).[16] Thus, "words uttered as mere political argument, idle talk or jest," *United States v. Olson*, 629 F.Supp. 889, 894 (W.D.Mich. 1986),

[15] Depending upon the context, such a statement might well violate 18 U.S.C. §241, which makes it a crime to "conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . ."

The issue of context is obviously key in these situations. For example, in *United States v. Lee*, ___ F.2d ___, No. 90-5264 (8th Cir. June 10, 1991), the Eighth Circuit recently divided on the question of whether a cross burning that took place on a hill nearly four hundred feet away from an apartment complex with several black families could be prosecuted as a "threat" under 18 U.S.C. §241. Similarly, in *State v. Miller*, 629 P.2d 748, 751 (Kan.App. 1981), the court held that cross burning is not "per se a terroristic threat as prohibited" by state law but that "the surrounding facts and relationship of the parties involved may be such that . . . the burning of a cross on the property of another is the communication of a terroristic threat."

[16] *Amici* recognize that the majority of courts have held that the state need not prove that the defendant intended a threat to the President in order to bring a prosecution under 18 U.S.C. §871. But, as Justice Marshall pointed out in *Rogers*, 422 U.S. at 43, this Court has expressed its "grave doubts" about the correctness of the so-called objective test for determining a threat. *See Watts v. United States*, 394 U.S. at 707. *Amici* share those doubts in the context of a criminal prosecution.

cannot be subject to criminal prosecution. Likewise, "political hyperbole" cannot be made actionable even when aimed at a specific public figure. *Watts v. United States*, 394 U.S. at 708.[17]

In *Watts* itself, the Court overturned the conviction of a student protestor who said, in the course of an anti-war demonstration: "If they ever make me carry a rifle the first man I would get in my sights is L.B.J." *Id.* at 706.[18] The decision in *Watts* rested on statutory interpretation grounds. However, the Court's interpretation of the statutory reference to "threat[s]" was measured against "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*, *quoting New York Times Co. v. Sullivan*, 376 U.S. at 270.[19]

It is tempting to say that the message conveyed by even the public burning of a cross during a political rally is so offensive, so hurtful, and so antithetical to the ideal of equality, that it ought to be subject to prohibition without the need for rigorous scrutiny of whether it crosses some First Amendment line from protected advocacy to unprotected threats or intimidation. The Constitution, however, does not tolerate such shortcuts.

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[17] *Amici* do not address whether there are interests other than preventing threats of violence that can justify content-based restrictions on expression. *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment may state a claim for relief under Title VII).

[18] The defendant was convicted under 18 U.S.C. §871, which makes it a crime to "knowingly and willfully . . . [make] any threat to take the life or to inflict bodily harm upon the President of the United States."

[19] *Cf. Rankin v. McPherson*, 483 U.S. 378 (1987)(holding that government employee cannot be dismissed for commenting favorably on the Reagan assassination attempt in a private conversation).

At the same time, it would be wrong to ignore the undeniable fact that our history is replete with unfortunate incidents in which unpopular groups (whether their unpopularity was based on race, religion, ethnicity, gender, sexual preference, or political belief) were coerced into forfeiting their constitutional rights because of threats or intimidation that often went unremedied and, during more disgraceful periods, were tacitly condoned.

The task facing our nation is to promote the values of both free speech and equality without sacrificing either. As noted in Point I, that goal has not been met by the St. Paul ordinance at issue in this case.

CONCLUSION

For the reasons stated herein, the decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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